THE GROWTH OF JUDICIAL POWER

BY

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ALTHOUGH our written state constitutions have reached such enormous proportions, it should be remembered that there is also a large body of unwritten constitutional law controlling both state and federal governments. It is my purpose here to discuss briefly an important development in the field of the unwritten constitution, namely, the change which has come about in the attitude of the courts toward legislation, especially with reference to the exercise of the judicial power of declaring laws unconstitutional.

Until a few years ago the attitude of the courts on this subject conformed rather closely to the view expressed by Chief Justice Waite in the Sinking Fund Cases: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."[1] The courts still repeat expressions of this character, but it is undoubtedly true that they have departed widely from the doctrines which such expressions embody. The principle that a statute must not be declared invalid unless its inconsistency with the constitution is clear and beyond reasonable doubt has, as Judge Baldwin suggests, become untenable, because such decisions are frequently rendered by a divided court, whose dissenting members must be presumed to have a reasonable doubt regarding the question of unconstitutionality.[2] In fact, it may be said to be true that practically all important decisions declaring statutes unconstitutional are now rendered by divided courts.

[1] 99 U. S. 700, 718 (1878).

[2] Baldwin, American Judiciary, p. 103.

In the case of Atkin *v.* Kansas,[1] involving a Kansas statute establishing an eight-hour day for state and municipal public works, Mr. Justice Harlan, who delivered the opinion of the court, said:

> No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives.

In Lochner *v.* New York,[2] we find Justice Harlan now in a dissenting opinion, using similar language with reference to the New York law limiting labor in bakeries to ten hours a day. Justice Harlan's expressions are cited not to imply any great change of mind on the part of the Supreme Court of the United States within the period of less than two years intervening between these decisions, but simply as indicative of a change which has been going on for a number of years in the attitude of the courts toward legislation.

The courts have now definitely invaded the field of public policy and are quick to declare unconstitutional almost any laws of which they disapprove, particularly in the fields of social and industrial legislation. The statement still repeated by the courts, that laws will not be declared unconstitutional unless their repugnance to the constitution is clear beyond a reasonable doubt, seems now to have become "a mere courteous and smoothly transmitted platitude."

As an indication of the present attitude of the courts may be mentioned some recent decisions declaring unconstitutional laws affecting the payment of wages by employers. Such acts, when held invalid, have usually been declared unconstitutional as a violation of the right of liberty and property, or as a discrimination between different employments. Thus in Kellyville Coal Company *v.* Harrier,[3] an act forbidding employers engaged in

[1] 191 U. S. 223 (1903).

[2] 198 U. S. 45, 74 (1905).

[3] 207 Ill. 624 (1904).

mining or manufacturing to make deductions for advances to employees, except when such advances were made in money, was held invalid as depriving both employer and employee of liberty and property, and as a discrimination in favor of farmers, who were not included in the terms of the law. So in Toledo, St. Louis and Western Railroad Company *v.* Long,[1] an act requiring corporations to pay their employees in money was held invalid as depriving corporations of the equal protection of the laws. In Missouri and Texas similar laws, which were not discriminatory but which applied equally to all corporations and individuals, have recently been held unconstitutional as violating the rights of liberty and property.[2] State anti-trust statutes have frequently been held unconstitutional because they excepted from their provisions agricultural products and livestock while in the hands of the producers.[3] In the case of Starne *v.* People,[4] the supreme court of Illinois held unconstitutional a statute requiring mine owners to provide washrooms at the top of each coal mine for the use of their employees, on the ground that this was an improper discrimination in favor of miners.

It is submitted that these decisions have extended very widely the provisions of the federal and state constitutions. The courts seem now to have reached the point of treating as unconstitutional practically all legislation which they deem unwise.[5] The courts will, if they desire, find sufficient reason for declaring a statute invalid either (1) as violating the right of contract, or (2) as depriving persons of liberty and property without due process of law, or (3) as depriving them of the equal protection of the laws. These broad guaranties of the federal and state constitutions have been so extended by judicial interpretation as to give the courts in practically every case the final determination as to whether or not laws shall be enforced,

[1] 169 Ind. 316 (1907).

[2] State *v.* Missouri Tie and Timber Company, 181 Mo. 536 (1904); Jordan *v.* State, 51 Tex. Crim. Rep. 531 (1907).

[3] Connolly *v.* Union Sewer Pipe Company, 184 U. S. 540. See Ernst Freund, Police Power, secs. 310–321, 356, 734.

[4] 222 Ill. 189 (1906).

[5] Ernst Freund in *Green Bag*, vol. xvii, p. 416.

and the exercise of this power is untrammeled in fields where new legislation may be enacted to apply to changing industrial and social conditions.[1]

Special attention should be called to the present judicial interpretation of the phrase, "equal protection of the laws." The courts lay down a standard of theoretical equality, without much reference to the facts in particular cases, and declare invalid laws which do not square with their *a priori* theories. Thus in the Kellyville Coal Company case, cited above, the court held it improper to exclude farmers from the operation of a law against the payment of employees in store orders, but did not take into consideration the fact that the evils aimed at could hardly exist in the field of agriculture. So state and federal decisions declaring state anti-trust laws unconstitutional, because not made applicable to possible combinations of farmers, do not consider that the nature of the farming industry makes practically impossible among farmers such combinations as are denominated "trusts." It is a serious question also whether the courts have a sufficient basis of fact on their side in declaring unconstitutional laws which discriminate between corporations and individuals with reference to the payment of wages and as regards employers' liability.[2] Inasmuch as abuses are most apt to occur in large industries and as practically all large industrial activities are now conducted under corporate organization, it would seem that corporations as distinct from indi-

[1] As to the extension of the term "liberty" by judicial interpretation, see Charles E. Shattuck in *Harvard Law Review*, vol. iv, p. 365. With reference to the right of contract, attention should be called to the Missouri Tie and Timber Company case, cited above, and to People *v.* Williams, 189 N. Y. 131 (1907). In the latter case the court held invalid as repugnant to the state constitution a law forbidding night work by women. It may be well, however, to call attention to the fact that the attitude of the courts toward legislation is not the same in all states. The courts of some states have often used the argument of public policy to broaden the interpretation of constitutional provisions and to uphold new legal regulations. Yet it does seem to be true that the courts of a number of the important industrial states have usually exercised their power for the purpose of defeating new legislation with reference to industrial and social conditions.

[2] Toledo, St. Louis and Western Railroad Company *v.* Long, 169 Ind. 316 (1907); Bradford Construction Company *v.* Heflin, 88 Miss. 314 (1906); Bedford Quarries Company *v.* Bough, 168 Ind. 671 (1907).

viduals may well form a separate class with reference to these matters. In a number of cases during recent years the Illinois court has extended very widely the constitutional guaranty of "equal protection of the laws."[1] In Starne *v.* People, cited above, the court refused to consider the question of fact as to whether the mining of bituminous coal is not work of such a character as to justify special provision for wash-rooms, but broadly declared that "the legislature cannot ameliorate the coal miner's condition under the guise of the exercise of the police power and leave others unaided who suffer from like causes." This statement seems to deprive the legislature of all power of determining the question of means for the accomplishment of its objects, and to vest in the courts the whole power of deciding as to the reasonableness and propriety of legislation. Perhaps the furthest step in extending the application of the phrase "equal protection of the laws" has been taken by the Missouri court in State *ex rel.* Johnson *v.* Chicago, Burlington and Quincy Railroad Company.[2] In this case there was under consideration a state constitutional amendment permitting counties and towns to levy road and bridge taxes, but from the provisions of this amendment were excepted St. Joseph, St. Louis and Kansas City. The court held the amendment invalid as a deprivation of "equal protection of the laws" under the federal constitution, on the ground that it was a discrimination in favor of the excepted cities against other parts of the state.[3]

The present attitude of the courts seems fully to justify Professor Pound's criticism of their "narrow and illiberal construction of constitutional provisions, state and federal."[4] The courts have now become practically legislative organs with an

[1] James M. Matheny in *Illinois Law Review*, vol. iii, p. 131.

[2] 195 Mo. 228 (1905).

[3] In 1908 another constitutional amendment with reference to road and bridge taxes was adopted and was made applicable to the whole state.

[4] Roscoe Pound in *Harvard Law Review*, vol. xxi, p. 383. See also People *v.* Brock, 149 Mich. 464 (1907). In this case the court read into the constitution a guaranty regarding criminal trials and then held a law invalid as violating such implied constitutional guaranty.

absolute power of veto upon statutory legislation which they regard as inexpedient.[1] If we may judge by a recent Indiana case, in which the court declared a statute unconstitutional when the question of constitutionality had neither been raised nor argued before the court, it would seem that judicial decisions of this character may in future be made after less careful consideration than heretofore.[2]

Since 1902 the New York State Library has annually collected in its *Index of Legislation* a list of judicial decisions declaring state laws to be invalid. A statement of the number of occasions on which the judicial veto upon state laws has been exercised is of some interest.

YEARS.	BY STATE COURTS.	BY U. S. SUPREME COURT.
1901–02	72	—
1902–03	48	2
1903–04	57	3
1904–05	52	2
1905–06	103	1
1906–07	94	5

The invasion of the field of public policy by the courts introduces into the law an added element of uncertainty. In this field decisions of the courts necessarily depend not upon any fixed rules of law but upon the individual opinions of the judges on political and economic questions; and such decisions, resting, as they must, upon no general principles, will be especially subject to reversal or modification when changes take place in the personnel of the courts.[3] Moreover there can be no certainty as to whether laws will stand, until after they have

[1] Learned Hand in *Harvard Law Review*, vol. xxi, p. 501. The constitutions of Missouri, Minnesota, Kansas, Alabama and Michigan expressly give the courts supervisory control over the exercise by the legislatures of power to enact local and special legislation. The Michigan provision for this purpose (article v, section 30) reads: "The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question."

[2] Kraus *v.* Lehman, 83 N. E, 714. Clarence R. Martin in *American Law Review*, vol. xlii, p. 641.

[3] Baldwin, American Judiciary, p. 117. Ernst Freund, in *Green Bag*, vol. xvii, p. 416.

been passed upon by the higher courts. Those able to contest a law immediately upon its first going into effect will avoid its application if it should finally be declared unconstitutional, but those not contesting its constitutionality must obey it until it is declared invalid. The present practice of treating a law as valid until it has been declared unconstitutional by the courts, illogical though it is, can hardly be abandoned so long as courts hold to the doctrine that the constitutionality of a law may be passed upon only for the purpose of deciding a litigated question actually submitted to the court. A decision declaring a statute unconstitutional now works in effect as a repeal operative only for the future, except as to the acts under the statute which are being contested before the courts and as to acts not fully completed when the decision is rendered. The more logical view that all acts done under an unconstitutional law shall be treated as invalid may at some time be taken by the courts; but such a doctrine would introduce even more uncertainty than the present practice; and it would cause important laws to be practically disregarded until they had obtained judicial approval, for one acting upon the faith of a law not so tested would be acting at his peril.[1] Such a step would also consti-

[1] The present legal theory is that a law declared unconstitutional can have conferred no authority or rights. This theory is well expressed by Mr. Justice Field in Norton *v.* Shelby County, 118 U. S. 442; "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." But the legal practice is different: (1) The federal courts protect contract rights acquired under a state statute declared unconstitutional, and they now seem inclined to protect property rights acquired in a similar manner. (2) Taxes voluntarily paid under an unconstitutional law may not be recovered, and the word "voluntary" is interpreted to cover almost all forms of payment. (3) A person holding an office created by an unconstitutional statute is a *de facto* officer, whose acts are valid with reference to third parties and to the public. (*Cf.* Wallach, "De Facto Office," POLITICAL SCIENCE QUARTERLY, vol. xxii, p. 450.) (4) There is now a tendency on the part of the courts to treat a corporation organized under an unconstitutional law as a *de facto* corporation, and so to protect rights which it may have acquired. (5) Many statutes are of such a character that a decision declaring them unconstitutional can properly operate only for the future. So in State *v.* Beacom, 66 Ohio St. 491, the law under which the city government of Cleveland had operated for more than ten years was declared to be invalid, but the court, far from holding all acts under the law to be void, suspended judgment so as to permit the city to be governed for almost another year under the invalid statute. (6) A declaration that a criminal

tute the courts more clearly a portion of the legislative machinery than at present, in as much as it would necessarily raise a presumption against the validity of a law until after the courts had held it to be constitutional.

It is in point to inquire as to the competence of the courts to exercise revisory power over legislation.[1] As Professor Pound has remarked:

> Courts are less and less competent to formulate rules for new relations which require regulation. They have the experience of the past. But they do not have the facts of the present. They have but one case before them, to be decided upon the principles of the past, the equities of the one situation, and the prejudices which the individualism of common-law institutional writers, the dogmas learned in a college course in economics and habitual association with the business and professional class must inevitably produce. It is a sound instinct in the community that objects to the settlement of questions of the highest social import in private litigations between John Doe and Richard Roe.[2]

Judges of our higher courts represent the training and opinions of the past and are not proper persons to determine questions of policy with reference to new industrial or social conditions. Whether or not it may be of importance, it is nevertheless true that courts exercise their power to declare laws invalid, where the laws are not clearly repugnant to the constitution, most frequently in cases under the police power involving the protec-

statute is invalid would operate to discontinue proceedings pending under the act, and would entitle persons at the time imprisoned under the act to demand that they be released; but a person who has already served a term of imprisonment under the law would have little if any remedy.

[1] It is beyond the scope of this paper to discuss the effect of judicial supervision upon the quality of the legislative product. It may be well to remark, however, that the legislatures are thus deprived of much of the small share of responsibility which has been left to them by the written constitutions of the states. It is also beyond the scope of this paper to discuss the effect of unwise and careless state legislation in producing the present attitude of the courts.

[2] Roscoe Pound, "Common Law and Legislation", *Harvard Law Review*, vol. xxi, p. 403. This article is an able criticism of the present attitude of the courts toward legislation.

tion of the public or of laborers.[1] The courts on this account have given weight to popular criticism of the judicial branch of our government as unduly favorable to the so-called vested interests.

In the sixteenth and seventeenth centuries the judiciary stood between the public and the crown. It protected the individual from the state when he required that protection. Today, when it assumes to stand between the legislature and the public and thus again to protect the individual from the state, it really stands between the public and what the public needs and desires, and protects individuals who need no protection against society which does need it. Hence the side of the courts is no longer the popular side.[2]

It has already been noted that state courts can and in many cases do exercise an absolute veto upon state statutes. This veto is usually interposed upon the ground that the statute under consideration is repugnant to the provisions of the state constitution. The states, however, have another legislative process superior to the enactment of statutes by the state legislatures, and may, if sufficient interest be manifested in the measure which the state courts have declared invalid, overrule these courts by placing the substance of the invalidated law in the state constitution, either by an amendment or in connection with a general revision. A tendency to overrule judicial decisions by constitutional alterations has been clearly apparent in recent years.[3] Thus in 1899 the supreme court of Colorado, upon

[1] Many courts have held labor legislation invalid on the specious argument that it deprives the laborers themselves of constitutional rights. See, for example, in Godcharles *v.* Wigeman, 113 Pa. St. 431, an eloquent defense of the laborer's rights of liberty and contract, while the court in its decision extends the phrase "right of contract" in such a manner as to declare unconstitutional legislation beneficial to laborers. The language of the Godcharles case was recently quoted with approval in State *v.* Missouri Tie and Timber Company, 181 Mo. 536. As to the attitude of the courts toward injured employees, see an article by William Hard in *Everybody's*, September, 1908. See also H. R. Seager in POLITICAL SCIENCE QUARTERLY, vol. xix, p. 589.

[2] Roscoe Pound in *Harvard Law Review*, vol. xxi, p. 403.

[3] Attention should be called to the fact that this discussion relates simply to cases in which laws have been declared unconstitutional where their repugnance to the constitution is not clearly apparent. Many cases of course arise in which restrictions im-

arguments that are at least questionable, held invalid as in violation of the constitution of that state a legislative act limiting a day's labor in mines and smelters to eight hours. In 1902 a constitutional amendment was adopted by the people of Colorado fixing eight hours as a working day in mines.[1] Montana in 1904 and Oklahoma in 1907 introduced into their constitutions provisions limiting a day's labor in mines to eight hours. A series of decisions by the New York Court of Appeals, beginning in 1901, held unconstitutional state statutes regulating hours and conditions of labor on state and municipal public works.[2] An amendment to the constitution of New York, adopted in 1905, provides that the legislature shall have power to "regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare and safety of persons employed" by the state or any civil division thereof, or on public contracts. California in 1902, Montana in 1904 and Oklahoma in 1907 adopted constitutional provisions establishing an eight-hour day upon state and municipal public works. California, after three unsuccessful attempts of its legislature to enact a primary election law which would meet judicial approval, in 1899 adopted a constitutional amendment upon this subject in order to overcome difficulties raised by the court.[3] Michigan in 1902 by constitutional amendment authorized its legislature to provide by law for indeterminate sentences, thus overcoming a decision of the supreme court of that state declaring such a law unconstitutional.[4] New Hampshire

posed by one constitution are later deemed unwise and are removed either by amendment or constitutional revision, but such cases are not in point. No effort is made here to call into question the exercise of power by the courts where a statute is clearly repugnant to constitutional provisions.

[1] *In re* Morgan, 26 Colo. 415. See also Ernst Freund, Police Power, sec. 155.

[2] People *v.* Coler, 166 N. Y. 1; People *v.* Orange County Road Construction Company, 175 N. Y. 84; People *v.* Grout, 179 N. Y. 417. See also Cleveland *v.* Construction Company, 67 Ohio St. 197 (1902).

[3] E. C. Meyer, Nominating systems, pp. 196, 354. Marsh *v.* Hanley, 111 Cal. 368; Spier *v.* Baker, 120 Cal. 370; Britton *v.* Board, 129 Cal. 337.

[4] People *v.* Cummings, 88 Mich. 249; *In re* Campbell, 138 Mich. 597; *In re* Manaca, 146 Mich. 697. The indeterminate sentence provision is repeated in the Michigan constitution of 1908, art. v, sec. 28.

in 1903 adopted a constitutional amendment specifically authorizing the taxation of franchises and inheritances, in order to overcome decisions of the supreme court of that state that such taxes were unconstitutional.[1] The constitutional provisions of Mississippi (1890), Virginia (1902) and Oklahoma (1907), abrogating or partially abrogating the common-law fellow-servant rule, do not appear to have been occasioned by judicial decisions, but they were probably intended as precautionary measures, and they seem justified in view of the narrow interpretation given by the supreme court of Mississippi to the constitutional and statutory provisions of that state upon this subject.[2]

A recent writer has said that "if the court is to retain the absolute right to pass in the final result on the expediency of statutes passed by the legislature," some change will be necessary either in the courts or in the constitution.[3] As has been indicated above, a change is rapidly taking place in our state constitutions, and these constitutions are being turned "from fundamental frames of government into statutory codes," largely because of the narrow and illiberal attitude of the courts in interpreting constitutional provisions. This development will probably go further than it has yet gone, and we may reasonably expect provisions to be introduced into state constitutions regarding employers' liability, hours of labor, payment of wages and other matters affecting industrial and social relations, where such provisions may be thought necessary to overcome judicial decisions of the states or may be thought desirable as measures of precaution against decisions which the courts might otherwise render.

State constitutional amendments of this character, made necessary by judicial decisions, are of course binding upon state courts only as regards the power of these courts to declare laws

[1] State *v.* United States and Canada Express Company, 60 N. H. 219; Curry *v.* Spencer, 61 N. H. 624. Journal of New Hampshire Constitutional Convention of 1902, p. 596.

[2] Bradford Construction Company *v.* Heflin, 88 Miss. 314 (1906).

[3] Learned Hand in *Harvard Law Review*, vol. xxi, p. 500.

invalid as in violation of state constitutions. The state courts are still free to declare state laws or state constitutional provisions invalid as in violation of the federal constitution; and if bound by definite provisions in state constitutions, they will probably base their decisions regarding the invalidity of laws upon the federal constitution.[1] If the highest court of a state declares a state statute or a state constitutional provision invalid as in violation of the federal constitution, its decision is final, for there is no appeal to the United States Supreme Court from a state decision invalidating a state enactment as repugnant to the constitution or laws of the United States. The state courts may on this account limit the power of the states to a very great extent, in matters not already passed upon by the Supreme Court of the United States, and from their decisions there is now no appeal, although, of course, it is possible for the United States by act of Congress to permit appeals to the federal Supreme Court in such cases.

In matters with which the Supreme Court of the United States has had occasion to deal, the state courts are bound by the interpretation which the federal tribunal has placed upon the federal constitution. As regards measures already upheld by the United States Supreme Court, the states will be to a large extent freed from restrictions placed upon them by state judicial decisions declaring laws invalid, and may with impunity enact into their constitutions any provisions which the federal Supreme Court has in its wisdom held proper and expedient. Thus the states may, if they find it necessary to overcome state judicial decisions, insert in their constitutions provisions establishing an eight-hour day on public works[2] or

[1] As, for example, in State *ex. rel.* Johnson *v.* Chicago, Burlington and Quincy Railroad Company, 195 Mo. 228 (1905). Statutory alterations of state constitutions, such as are permitted in Virginia and Oklahoma, will of course be regarded by the courts simply as ordinary statutes. It is a question whether the distinction between state statutes and state constitutions is not breaking down, and whether the state courts are not becoming as free to declare state constitutional provisions invalid because repugnant to the federal constitution as state and federal courts are to declare statutes invalid as repugnant respectively to the state or federal constitutions. Thayer, Legal Essays, pp. 37, 38. See note in *Illinois Law Review*, vol. iii, p. 303.

[2] Atkin *v.* Kansas, 191 U. S. 207.

in mines,[1] a ten-hour day for females in laundries,[2] but not a ten-hour day for both males and females in bakeries,[3] or a truck act applying to all employers.[4]

The point which I wish to make is that if the highest state court declares a state law invalid as in violation of the state constitution such a decision is final. If, however, legislation upon the matter in question is introduced into the state constitution, the state court, if it again holds the enactment invalid, must declare it to be so because of its repugnance to the federal constitution, and in the latter case the state court is bound by the decisions of the Supreme Court of the United States interpreting the federal constitution with reference to the matter under consideration. For example, if an act establishing an eight-hour day in mines were held invalid as violating a state constitution, such legislation might then be introduced by amendment into the state constitution itself. The state court cannot then declare the eight-hour law for mines invalid as a violation of the federal constitution, because the Supreme Court of the United States has already held such a law not to be unconstitutional.

The state courts will thus continue to possess what is practically an absolute veto on state statutory legislation, and on state constitutional provisions which have not already been approved in substance by the Supreme Court of the United States. By introducing legislation into their state constitutions the states will, however, be entirely free to act within the fields in which legislation has already been upheld by the Supreme Court of the United States. Only legislation which has been passed

[1] Holden *v.* Hardy, 169 U. S. 366.

[2] Muller *v.* Oregon, 208 U. S. 412. Under the Illinois case of Ritchie *v.* People, 155 Ill. 98, and under the New York case of People *v.* Williams, 189 N. Y. 131, it would seem that constitutional enactments will be necessary in these states to permit even such state legislation regarding the labor of women as was upheld by the United States Supreme Court in Muller *v.* Oregon.

[3] Lochner *v.* New York, 198 U. S. 45.

[4] Knoxville Iron Company *v.* Harbison, 183 U. S. 13. Under Missouri Pacific Railway Company *v.* Mackey, 127 U. S. 205, and Railroad Company *v.* Pontius, 157 U. S. 209, it would seem that the states may also safely abrogate the fellow-servant rule with reference to hazardous employments.

upon by the highest federal court may be safely introduced into state constitutions for the purpose of overcoming state judicial decisions. When introducing legislation into its constitution which has not been so tested, a state will naturally prefer to have the validity of such legislation contested in the federal rather than in its own courts, for it would thus avoid possible annulment of the enactment by the state court and would have the opportunity to obtain a final adjudication by the Supreme Court of the United States.

It may be objected that this simply results in transferring the judicial veto of legislation from one body to another, or rather from several bodies to one, leaving the Supreme Court of the United States to determine finally upon the expediency of all legislation, both federal and state; that it simply results in augmenting still further the powers of the federal government at the expense of the states.[1] This is true, but such a result, while not satisfactory, is better than the present condition, under which a court may block legislation in its own state while all other state courts and the Supreme Court of the United States may permit such legislation as not in conflict with constitutional provisions similar to those of the state in which such legislation is held invalid. One uniform rule, though unwise, is probably better than different rules for each of the forty-six states.

Yet it is hardly proper in this connection to speak of the judicial decisions as establishing rules or principles. When the courts invade the field of public policy and pass upon the expediency or inexpediency of legislation, their decisions necessarily depend not upon any fixed rules of law but upon the individual opinions of the persons composing the court; and though in course of time precedents will be established upon a large number of questions, they will probably not obtain force as announcing or illustrating general principles, but simply as

[1] The Supreme Court of the United States has already in recent years enlarged its jurisdiction with reference to state laws by refusing to follow judgments of state courts interpreting laws of their states and by itself determining whether the state courts have given proper effect to their state laws. See Henry Schofield in *Illinois Law Review*, vol. iii, p. 195, and Ernst Freund in *Green Bag*, vol. xvii, p. 412.

determining the precise questions upon which the court has passed, on the basis of the facts presented in each case.[1] Anyone attempting to harmonize the cases of Holden *v.* Hardy, Lochner *v.* New York and Muller *v.* Oregon will find it difficult to discover in them any common principle. The tendency of the Supreme Court of the United States to limit itself to the facts of the particular case in matters of this character is especially apparent in Muller *v.* Oregon. In this case a statute was under consideration limiting the labor of women to ten hours a day "in any mechanical establishment, or factory or laundry." The case before the court involved the violation of this law with respect to a laundry, but would seem to have brought the validity of the whole statute into consideration. The court held that the act was not in conflict with the federal constitution "so far as it respects the work of a female in a laundry," thus leaving open for future decision the question of the constitutionality of the Oregon statute in so far as it affects a "mechanical establishment or factory."

It would be better if the courts were to leave the determination of legislative policy to the legislative bodies and were to construe constitutional provisions broadly and liberally. The courts might properly narrow to more nearly their true meaning the broad guaranties of the federal and state constitutions. They might, for example, logically and consistently refuse to declare laws unconstitutional as depriving individuals of the "equal protection of the laws," unless those objecting to the law could show that its operation was clearly unequal and that it imposed a burden out of proportion to the benefit obtained. However, there is little reason to expect that the federal and state courts will in the near future adopt a more liberal attitude toward legislation.

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[1] Learned Hand in *Harvard Law Review*, vol. xxi, p. 501.